A

ROSHAYATI AHAT (WAKIL DIRI KEPADA MADON JOHAN, SI MATI) v. HAMDAN JOHAN

HIGH COURT MALAYA, JOHOR BAHRU
GUNALAN MUNIANDY JC
[ORIGINATING SUMMONS NO: 24NCVC-555-09-2014]
B 17 FEBRUARY 2015

CIVIL PROCEDURE: *Action – Res judicata – Subsequent application based on substantially same grounds as previous proceedings – Whether issues had been litigated and judicially determined – Whether earlier decision final and binding on*
C *parties – Whether subsequent application abuse of court process*

LAND LAW: *Caveat – Private caveat – Application for removal of – Applicant caveatee was lawful widow and beneficiary of estate of deceased registered proprietor – Whether caveatee had locus standi – Whether caveator had caveatable interest in land – Whether caveatee aggrieved person – National Land Code, ss. 323(1) & 327*
D

The applicant in the present originating summons ('present OS'), sought to remove a private caveat lodged by the respondent on a piece of land, to which the registered owner was the applicant's late husband ('the deceased'). The respondent alleged that the land was transferred to the deceased
E unlawfully and fraudulently by the then registered proprietor. The respondent and his sibling, one Joriah Johan, had respectively entered private caveats on the subject land on the grounds that there was an outstanding debt due from the deceased to their father and Joriah. The applicant applied for the removal of both caveats *vide* an OS ('the previous
F OS'). The High Court decided in favour of the applicant and ordered the removal of the caveats. Neither the respondent nor Joriah appealed against the order of the High Court. However, one day after the order, the respondent entered another private caveat on the land, on materially and substantially same grounds as the previous caveats and hence, the present OS pursuant to s. 327 of the National Land Code ('NLC') by the applicant as
G the aggrieved by its existence on the register. The respondent opposed the applicant's OS application on the grounds, *inter alia*, that: (i) the applicant had no capacity to sue or maintain the action under s. 327 of the NLC; and (ii) the defendant had a caveatable interest in the subject property

H **Held (allowing application with costs):**

(1) Section 327 of the NLC, read literally, in its natural and ordinary meaning, is sufficiently wide to cover the status of the applicant as the lawful widow and beneficiary of the estate of the deceased and vested sufficient capacity in her. It was so despite the applicant not having
I extracted the letters of administration or having produced the relevant Syariah Court Order to prove her purported representative capacity. Hence, the contention as to *locus standi* raised by the respondent was a non-starter, a non-issue and untenable in law. (para 22)

(2) It is implicit from the court's decision to order removal of the caveat under s. 327 of the NLC that the plaintiff's capacity and competency to bring the action as a person aggrieved is recognised. The issues arising had been litigated and judicially determined. The respondent also did not appeal against the decision of the High Court in the previous OS. Therefore, the judgment of the High Court in respect of the issues in the OS, which were the subject of the present previous OS, stood as final and binding on both parties. (paras 23 & 24)

(3) Further, the present private caveat was entered by the respondent in the previous OS less than a day after the judgment of the court, despite there being no challenge to the decision nor a stay of the order. This was evidence of *prima facie* abuse of the court and the legal processes that tantamount to blatantly disregarding a valid judgment and/or order of the court and the act should not be condoned or permitted by the court. (para 24)

(4) The respondent's claim against the applicant or the deceased was indisputably only for a liquidated sum and not a registrable interest in the subject land or a claim to its title which was never in dispute. Hence, the respondent's claim, considering the grounds expressed in Form 19B, plainly did not amount to any caveatable interest in the subject land. The allegation of fraudulent and unlawful transfer of the land to the deceased was clearly time-barred and thus, of no consequence to this proceedings. Hence, the caveat had been wrongfully and unlawfully entered contrary to the provisions of s. 323(1) of the NLC and ought to be removed at the instance of the aggrieved party under s. 327 of the NLC. (paras 25 & 26)

Case(s) referred to:

Al Rashidy Kassim & Ors v. Rosman Roslan [2007] 3 CLJ 361 FC ***(refd)***
Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***
Hew Sook Ying v. Hiw Tin Hee [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 SC ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***
Mosbert Berhad (In Liquidation) v. Stella D' Cruz [1985] 1 LNS 47 FC ***(refd)***
Teo Ai Choo v. Leong Sze Hian [1986] SLR 75 ***(refd)***
Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin [1997] 3 CLJ 854 CA ***(refd)***

Legislation referred to:

National Land Code, ss. 323(1), 327

For the appellant - Khairulazwad (Khusaini Arbain with him); M/s Azwad Ihsan & Co
For the respondent - Sasindran; M/s Nor Ding & Co

Reported by S Barathi

A

JUDGMENT

Gunalan Muniandy JC:

[1] This is an application by originating summons ('OS') wherein the applicant seeks to remove a private caveat entered by the defendant on a
B piece of land held under GM 673 Lot 581, Tebing Runtuh, Mukim Pulai, Johor Baru, Johor ('the subject land'). The defendant lodged the caveat premised on the allegation that the subject land was transferred to the plaintiff's husband ('the deceased') unlawfully and fraudulently by the then registered proprietor.

C **Factual Background**

[2] The deceased is currently the registered owner of the subject land, which was transferred to the deceased by his late father.

[3] On two separate dates, 11 December 2013 and 11 February 2014, one
D Joriah bt Johan, the defendant's sibling and the defendant himself, respectively entered private caveats on the subject land. Among the grounds relied upon for entry of the two caveats above was that there was an outstanding debt due from the deceased to their father and Joriah. The details are tabulated in the applicant's submission as follows:

E

First Caveat	Second Caveat
Claiming the sum of RM135,899.05 allegedly lent to the deceased to redeem the property.	Claiming the sum of RM100,000.00 allegedly lent to the deceased by their father to redeem the property.

[4] Subsequent to the entry of the above caveats, the applicant, *vide* OS
F No. 24-154-03/2014. ('the first OS') filed on 11 August 2014, applied for both the first and second caveats to be removed. In opposing that OS, both the defendant and Joriah averred that the subject land had been transferred to the deceased by their father through fraud, misrepresentation, under influence and/or coercions.

G

[5] Having considered the above application and the grounds advanced in support thereof, the High Court decided in favour of the applicant and gave an order for removal of the caveats on 11 August 2014. After the OS order, no appeal was brought against it at any material time by either the respondent or Joriah. The order, thus, till to date stands valid and binding on all parties
H concerned.

[6] However, on 12 August 2014, which was a mere one day after the OS order, the defendant entered yet another private caveat which was registered *vide* Presentation No. 993/2014 ('the third caveat') on the subject property on materially and substantially the same grounds as the previous caveats.
I Hence, the present OS for removal of the third caveat pursuant to s. 327 of the National Land Code ('NLC') by the applicant as the party aggrieved by its existence on the register.

Grounds Of Application

[7] The caveat entered by the defendant is wrongful as no caveatable interest existed in the subject land on his part to justify its entry.

[8] If the private caveat on the subject property is not cancelled, the applicant and the family members of the deceased would be burdened with the risk of being liable to pay damages for breach of the sale and purchase agreement ('SPA') entered into between the deceased and the purchaser, one IOI Harbour Front Sdn. Bhd., for failure to deliver the property free of encumbrances and restrictions. There was also the risk of the SPA being rescinded by the purchaser as a result of the caveat.

[9] Based on the material facts, the balance of convenience favoured the applicant.

[10] The court in the previous OS had heard the merits of the defendant's defence and as such, the defendant was bound by the court's judgment on merits. The OS order on the previous caveats was binding and final.

[11] Despite having made the serious allegation of fraud against the deceased in acquiring the subject property, the defendant had failed to lodge any police report or commence any action to enforce his claim to the subject property.

Grounds Of Opposition To The Application

[12] The defendant opposed the application on two principle grounds as follows:

(i) the applicant had no capacity to sue or maintain this action under s. 327 of the NLC and to apply for the relevant order sought against the defendant; and

(ii) the defendant had a caveatable interest in the subject property and the caveat must be maintained on the register until the disposal of the Johor Bahru High Court Civil Suit No. 22NCVC-169-10-2014.

The Law Applicable To Private Caveats

[13] The right to entry of a private caveat is governed by s. 323(1) of the NLC. It provides that:

> (1) The persons and bodies at whose instance a private caveat may be entered are-
>
> (a) any person or body claiming title to, or any registrable interest in, any alienated land or undivided share in any alienated land or any right to such title or interest;
>
> [Am. Act A1104 - Prior text read - "(a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;"]

A

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

(c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

B

[14] As regards the right to apply to the court for removal of a private caveat, the governing law is s. 327 of the NLC which states:

(1) Any person or body aggrieved by the existence of a private may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

C

(2) The Registrar shall, on being duly served with any order under this section for the removal of a caveat, cancel the entry thereof on the register document of title, and note thereon the reason for cancellation and the date thereof.

(3) Every cancellation under sub-section (2) shall be signed and sealed.

D

[15] The NLC does not define the term 'person or body aggrieved'. In the Court of Appeal case of *Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin* [1997] 3 CLJ 854; [1997] 2 MLJ 487, Mokhtar Sidin JCA, held:

E

The Code contains no definition on who is an aggrieved person. To my mind, the word 'aggrieved' must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved persons is never closed.

F

[16] The leading authority on the issue as to whether a private caveat entered under s. 323(1), NLC should be removed under s. 327, NLC is the Court of Appeal case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520 where the three-stage test for the removal of a private caveat was expounded. The relevant part of the judgment of Gopal Sri Ram JCA (as he then was) states:

G

In my judgment, there are three stages through which an inquiry of this nature must go. The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are insufficient in law to support a caveat, then *cadit quaestio*, and the caveat must be removed without the necessity of going any further. …

H

Wong Kuan Tan v. Gambut Development Sdn Bhd [1984] 2 MLJ 113 illustrates how the issue of caveatability may be concluded at the first stage …

I

Hashim Yeop A. Sani FJ (later CJ, Malaya) stated the proposition (at p. 115) in language unrivalled for its clarity:

To put it more simply, the caveator in this case must first satisfy the Court that he was 'caveatable interest' in the land. Only if he has such an interest can he qualify to lodge a caveat under s. 323

> of the National Land Code. In the application to have the caveat removed the onus is cast upon the caveator to satisfy the Court that on the evidence presented his claim to an interest in the land raises a serious question to be tried and after having done so he must go on to show that on the balance of convenience the caveat should be extended until the disposal of the main action.
>
> …
>
> The matter does not come to an end once the caveator satisfies the Court that his claim as expressed in the application in Form 19B amounts in law to a caveatable interest. He must go on to show, in appropriate cases, that, based on the affidavits filed, his claim discloses a serious question meriting a trial. This then is the second stage. The degree of proof that has to be offered will, of course, vary from case to case.
>
> At this the second stage the Court is more concerned with matters of evidence and proof offered to support the caveator's claim. …
>
> The third stage is arrived at only after the first two hurdles have been crossed by the caveator. Here the question to be asked relates to the balance of justice, or what Lord Diplock termed in *Eng Mee Yong* (*supra*) as 'the balance of convenience'. As to the matters that go to determine in which direction the balance should tilt, these have already been set out in such clear terms by Lord Diplock in *Eng Mee Yong* that mere repetition becomes unnecessary.
>
> It is only upon satisfying these three stages of crucial scrutiny that a caveat may be permitted to remain. That this should be so is only logical; for it is a serious matter to caveat a person's property, and unless a case is properly made out, a caveat ought not be permitted to remain on the register a moment longer than is absolutely necessary.

[17] In an application by a caveatee under s. 327 of the NLC the onus is on the caveator to satisfy the court that the caveat ought to be maintained. In *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212, Lord Diplock expressed the nature of the onus to be this:

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under s. 327 for removal of a caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried: and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

[18] The Supreme Court in *Hew Sook Ying v. Hiw Tin Hee* [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120; [1992] 2 MLJ 189, where the Singapore High Court case of *Teo Ai Choo v. Leong Sze Hian* [1986] SLR 75 was cited with approval, held that in order to establish a caveatable claim to title to or registrable interest in land under s. 323(1), NLC, it is a must for the caveator to file a claim within a reasonable time for adjudication. Mohamad Azmi, SJC held:

> In an application to remove a private caveat under s. 327 of the NLC the principle laid down by the Privy Council in *Eng Mee Yong & Ors v. Letchumanan* has been consistently applied by the courts in this country. In order to succeed the caveator must establish two ingredients, failing which, the caveat will not be allowed to continue. …
>
> …
>
> In our opinion as between the applicant/purchaser and the caveator/third party, to establish a caveatable claim to title or registrable interest in land under s. 323(1) of the NLC, it essential for the caveator to have a claim filed or to be filed within reasonable time for adjudication. It is only on this basis that the principle enunciated in *Eng Mee Yong* can be applied. Consequently, on an application for extension or to set aside the caveat, it is incumbent on the caveator to satisfy the court that he has such a claim before he proceeds to show that his said claim to title or registrable interest does raise a serious question or issue to be tried, and further on balance of convenience it would be better to maintain the status quo pending the trial of the action. …
>
> Further, even assuming for one moment that the caveator had a caveatable claim to title or registrable interest, he should not delay in filing his claim in court on the alleged claim. In the Singapore case of *Teo Ai Choo v. Leong Sze Hian*, it was held that a delay is fatal where at the hearing of an application to remove the caveat no writ was yet filed.

[19] In deciding whether a private caveat is valid, the court has to confine itself to the grounds in support expressed in its application as per the Form 19B of the NLC. In *Mosbert Berhad (In Liquidation) v. Stella D' Cruz* [1985] 1 LNS 47; [1985] 2 MLJ 446 (SC) Seha, SCJ expressed the test in this manner:

> For the purpose of deciding whether a private caveat is defective or void the High Court should confine itself to the caveat and other relevant supporting documents. The procedure to be adopted should be a simple and summary one.

Analysis And Finding

[20] The fundamental issue raised by the defendant ('D') against the removal of the caveat lodged by him on land belonging to the deceased, whose estate is represented by the plaintiff ('P'), his widow, is that P does not have the *locus standi* or capacity to commence this action. D contends that P does not have the requisite standing to commence this action for want of probate or letters of administration of the deceased registered owner's estate. This is a threshold issue on which the instant action would stand or fall.

[21] P, as the lawful widow of the deceased is manifestly a beneficiary of the deceased's estate and as such, at the least, had an equitable interest in the estate of the deceased, which includes the subject property. In this regard, the Federal Court in *Al Rashidy Kassim & Ors v. Rosman Roslan* [2007] 3 CLJ 361;

[2007] 4 MLJ 297 in answering the leave question whether beneficiaries of a deceased person had *locus standi* to commence an action, laid down the principle that:

> The beneficiaries in the present case have at least an equity in the estate of the deceased to entitle them to seek a declaratory judgment. The appellants had the *locus standi* to commence this action at least for the limited purpose of protecting and preserving the asset of the estate. An order that the land be re-transferred to the deceased would serve this purpose.

[22] This proposition is reflected in the words of s. 327 of the NLC itself which is couched in very wide terms to enable every person or body aggrieved by the existence of a private caveat to apply for its removal. Giving the provisions of s. 327 of the NLC their natural and ordinary meaning upon a literal reading, it is in my view, sufficiently wide to cover the status of P as the lawful widow and beneficiary of the deceased's estate and vest sufficient capacity in her. It is so despite P not having extracted the letters of administration or having produced the relevant Syariah Court Order to prove her purported representative capacity. Hence, on the facts and the wording of s. 327 of the NLC, the contention as to *locus standi* raised by D is a non-starter, a non-issue and untenable in law.

[23] More importantly, the crucial matters in the present dispute are the doctrine of *res judicata* and the principle of issue estoppels arising out of the judgment of the Johor Bahru High Court in the earlier OS action for an identical relief brought by the same plaintiff against the same defendant and another defendant, ie, his sibling. The said OS also concerns the same subject land and a private caveat lodged by same defendant on substantially the same facts and grounds as per the Form 19B. There is no record of whether the issue of P's *locus standi* was raised by the defendants at the previous OS or the court's ruling on this pivotal issue and the reasons for the decision thereof. It is implicit from the court's decision to order removal of the caveat under s. 327 of the NLC that the plaintiff's capacity and competency to bring the action as a person aggrieved was recognised. However, if it was raised and decided by the court, *res judicata* would apply to prohibit the issue being relitigated. If it was not advanced and not adjudicated upon, D would likewise be barred from raising it in subsequent identical proceedings by the operation of the principle of issue estoppels. A fundamental issue going to the capacity of P to commence the OS under s. 327 of the NLC that should have been raised and decided upon is prohibited from being litigated afresh in subsequent proceedings on the same subject-matter and dispute as an afterthought. On this vital point, the judgment of the Supreme Court in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 is illuminating. The court held:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an *estoppels per rem judicatum*. When a matter between two parties has been adjudicated by a court of

competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that it is in the public interest that there should be finality in litigation - i*nterest rei piblicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action - *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.

There are two kinds of *estoppels per rem judicatum*, ie cause of action estoppels and issue estoppels. The cause of action estoppels prevents reassertion of a cause of action which has been determined in a final judgment by the same parties. On the other hand, the issue estoppel prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. Further, the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently.

In order to prevent multiplicity of action and also in order to protect the underlying rationales of *estoppels per rem judicatum* and not to act against them, such estoppels of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence. A few cases below will illustrate the point.

[24] It has also to be noted that D did not bring an appeal against the decision of the High Court in the previous OS. The judgment of the High Court in respect of the issues in the OS which are the subject of the present OS therefore stands as final and binding on both parties to the dispute concerning the same subject -matter. The issues arising had been litigated and judicially determined. Equally of importance is the fact that the present private caveat was entered by a defendant in the previous OS less than a day after the judgment of the court on 11 August 2014 despite there being no challenge to the decision nor a stay of the order. This is clear evidence of *prima facie* abuse of the court and the legal processes that tantamounts to blatantly disregarding a valid judgment and/or order of the court. In view of the principle of finality of court proceedings, this act by D should not be condoned or permitted by this court.

[25] On the assumption that *res judicata* and issue estoppel do not apply to this instance, the crucial element that D must satisfy is that he has a caveatable interest in or claim to title to the subject land to qualify him to enter the private caveat under s. 322(1) of the NLC. On the facts, D's claim against P or the deceased is indisputably only for a liquidated sum and not a registrable interest in the subject land or a claim to its title which was never in issue. Hence, based on established authorities, D's claim, considering the grounds expressed in the Form 19B, plainly does not amount to any

caveatable interest in the subject land. The allegation of fraudulent and unlawful transfer of the land to the deceased is clearly time-barred and thus, of no consequence to this proceedings. D had manifestly failed to cross the very first hurdle in the three stage test expounded in *Luggage Distributors* (*supra*) which would, hence, justify removal of the caveat *in limine* without further deliberation.

[26] For the above reasons, I found that P had made out a distinctly clear case that the caveat in question had been wrongfully and unlawfully entered contrary to the provisions of s. 323(1) of the NLC and ought to be removed at the instance of the aggrieved party under s. 327 of the NLC. I accordingly allowed this application ('L1') with costs of RM5,000.